IN THE HIGH COURT FOR THE STATES OF PUNJAB & HARYANA AT CHANDIGARH

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CRIMINAL APPEAL NO.372-SB OF 2001

Decided on : May 11, 2007

Sanjay Nath @ Karan and another **...**Appellants

VERSUS

The State of Haryana **...**Respondent

CORAM :
HON'BLR MR.JUSTICE A.N.JINDAL

Present: Mr.R.S.Cheema, Senior Advocate assisted by
Ms.Tanu Bedi, Advocate for the appellants.

Ms.Shalini Attri, Assistant Advocate General
for the respondent – State of Haryana.

A.N.JINDAL, J.-

The case relates to a sordid story of rape of the prosecutrix in the train running from Patna to Ambala, by the accused/ appellants Sanjay Nath alias Karan and Chandan Kumar alias Pappu Yadav (hereinafter referred to as the accused) on 21.5.1997. Consequently, both the accused hailing from Bihar, who had accompanied the prosecutrix all the way to Ambala were challaned by the Government Railway Police, Ambala Cantt. On trial, they were convicted and sentenced to undergo punishment as under:-

U/s 363 read with Section 34 IPC		To undergo rigorous imprisonment for a period of five years and to pay fine of Rs.1000/-, in default of payment of fine, to undergo further rigorous imprisonment for three months, each.
U/s 366-A read with Section 34 IPC		To undergo rigorous imprisonment for a period of five years and to pay fine of Rs.1000/-, in default of payment of fine, to undergo further rigorous imprisonment for three months, each.
U/s 376(2)(g) read with Section 34 IPC		To undergo rigorous imprisonment for a period of ten years and to pay fine of Rs.2000/-, in default of payment of fine, to undergo further rigorous imprisonment for six months, each.

The prosecutrix (the name not being disclosed), a resident of Sitamari, Dumra Bihar, a student of IXth class, on 19.5.1997, had come to purchase a book in the market, along with her neighbourer Ravi Shanker, who was also a student of IXth class. After purchasing the book, they visited hotel Darpan, Patna, owned by the father of Sanjay Nath. Both the accused came across the prosecutrix in the hotel and by alluring the prosecutrix to have a trip to Shimla boarded Punjab Mail for going to Shimla on the morning of 20.5.1997.

On 21.5.1997 at about 4.00 a.m., after the train left Jagadhri Railway Station, the prosecutrix went to toilet, then both the accused followed her and committed rape upon her, one by one, simultaneously. Meanwhile, the train reached Ambala Railway Station, where she disclosed about the illegal act of the accused to Ravi Shanker. Consequently, after alighting from the train at Ambala Cantt, the prosecutrix made statement

Ex.PE before Assistant Sub Inspector Gurmail Singh, on the basis of which First Information Report Ex.PE/1 was registered against them. In the meanwhile, both the accused slipped away.

Assistant Sub Inspector Gurmail Singh headed the investigation. He recorded the statement of Ravi Shanker, got the prosecutrix medico-legally examined, took her underwear and the vagina swabs into possession. On 24.5.1997, the accused Chandan Kumar was arrested and was medico-legally examined on 26.5.1997. During Identification Parade, the prosecutrix identified him as the accused. Then on 14.6.1997, the accused Sanjay Nath also surrendered in the Court. On 28.6.1997, the accused refused to join the Identification Parade as arranged by the police on that day.

On completion of the formalities, challan was presented against both the accused. They were charge-sheeted under Sections 363/34, 366/34 and 376(2)(g) of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

In order to substantiate the charges against the accused, the prosecution examined Dr.Benu Gupta (PW1), Dr.Vivek Aggarwal (PW2), Satish Kumar Inspector (PW3), HC UGC Raj Singh (PW4), Som Dutt Assistant Sub Inspector (PW5), the prosecutrix (PW6), Rajdev Singh (PW7), Ram Babu Singh, Record Incharge (PW8), Chander Parkash, Naib Tehsildar (PW9), Gurmail Singh Assistant Sub Inspector (PW10), HC

Ram Bachan Rai (PW11), Dr.Vinod Gupta (PW12) and Khushal Singh Inspector (PW13). After giving up Ravi Shanker, Sudarshan Kumari Assistant Sub Inspector, Rameshwar Parshad and Dr.A.A.Lari as unnecessary and after tendering into evidence the affidavits of constables Mukesh Kumar and Dhoop Singh, the prosecution closed its evidence.

When examined under Section 313 of the Code of Criminal Procedure, both the accused denied all the incriminating circumstances appearing against them and pleaded their false implication in the case. Sanjay - accused also stated that on 19.6.1997 at about 8 p.m., the prosecutrix and Ravi Shanker came to his hotel and sought a room to stay for a night by representing them as brother and sister. Suspecting their relationship, they were refused accommodation. When they showed a receipt of Patna Travelling Agency regarding their booking of a ticket for going to Ambala by train, the accused Sanjay Nath allowed them to stay in the hotel. When a staff member went to their room for asking for a dinner, they were found in a compromising position. On coming to know this fact, Sanjay Nath went inside the room and told them to leave the hotel and threatened to inform the police, but both of them started weeping. At this, they were allowed to stay. In the morning, they left the hotel. Ultimately, he was implicated in this case.

Co-accused Chandan Kumar, also adopted the same plea, which reads as under:-

"In fact, on 19.5.97, at about 8.30 p.m. I was present in hotel Darpan with Sanjay Nath. At that time prosecutrix and Ravi Shankar came to the hotel and asked for a room to stay for a night. They introduced themselves as brother and sister. We suspected their relation and Sanjay Nath refused to give them a room. They then showed him a receipt of Patna Travelling Agency whereby they had paid Rs.500/- in advance to that agency for a ticket for going to Ambala. They were to board a train in the morning. Sanjay Nath gave them a room to stay. When the staff members of the hotel went to room to ask for dinner, they were in a position unbecoming for a brother and sister. The staff members returned and told that fact to Sanjay Nath. He went to the room and found them in the same position. He asked them to leave the room and also threatened to inform the police. They started weeping. Out of pity, Sanjay Nath allowed them to stay in the hotel. They left the hotel in the morning at 3.00/4.00 a.m. I do not know what happened, thereafter. Neither I nor Sanjay Nath accompanied them to Ambala."

In their defence, the accused examined Assistant Sub Inspector Sheshhajra of Police Station Budha Colony, District Patna as DW1, Mohd.Dawood, Travel Agent as DW2, Dr.R.S.Bugalia, Radiologist as DW3 and Amar Nath, father of accused Sanjay Nath as DW4.

Ultimately, the trial ended in conviction of both the accused for the aforesaid offences. Hence, this appeal.

I have heard Shri R.S.Cheema, Senior Advocate assisted by Ms.Tanu Bedi, counsel for the appellants and Ms.Shalini Attri, Assistant Advocate General appearing for the respondent – State of Haryana and have also scrutinised the record with their able assistance.

Before proceeding to determine the factum of abduction and gang rape, it would be essential to determine the age of the prosecutrix. In this regard, the evidence as brought forth on the file, speaks to the volumes that she was about 14 years of age at the time of incident. In addition to the testimony of the prosecutrix, where she disclosed her age as 14 years, there is evidence of PW1 Dr.Benu Gupta, who also observed her to be 14 years old. Her testimony stands corroborated by PW7 Rajdev Singh, father of the prosecutrix, who testified that she was born in the year 1985. During the cross-examination, he stated that he has three children and the prosecutrix was 13 years of age. He denied the suggestion that the prosecutrix was more than 18 years old. Besides the aforesaid evidence, evidence of PW8 Ram Babu Singh, Record-Incharge of Kamla Balika Uchha Vidhayalya Seeta Marhi, Bihar, where the prosecutrix was studying has deposed from the School Admission Register Ex.PK that date of birth of the prosecutrix was 15.2.1985. He has also proved an application moved by the mother of the prosecutrix admitting her in the School in the year 1995 in VIIth Class. He further proved the Migration Certificate issued by the Institution, from

where she had come for admission in the aforesaid school. The aforesaid evidence goes to show that the prosecutrix was about 14 years of age. No doubt, DW3 Dr.R.S.Bugalia disclosed that on Ossification Test, the prosecutrix was found to be between 16 and 17 years, but this Ossification Test conducted by him cannot be treated as conclusive proof and does not prevail over the primary evidence, adduced by the father of the prosecutrix and deposition made by the prosecutrix at the very initial stage before Dr.Benu Gupta. Even if the data given by Dr.R.S.Bugalia is examined, then it comes out that at the time of examination, she was having 14 teeth in the lower jaw and 12 teeth in the upper jaw, therefore, in the aforesaid circumstances, her age could not be assessed as 16 or more than 16 years and the evidence given by DW3 Dr.R.S.Bugalia can be said to be biased one.

Now while sitting to judge the truthfulness in the prosecution version, it is observed that the prosecution has relied on the testimony of the prosecutrix as well as medical evidence. Irrespective of the fact that Ravi Shanker, a neighbourer of the prosecutrix was withheld by the prosecution, yet no such infirmity has been found in the statement of the prosecutrix, which could be treated as sufficient to dub her as a false witness. She being the immature girl of IXth class, had gone in the company of Ravi Shanker, who too was a student of IXth class, for purchasing the book. It also hardly matters that if the prosecutrix in her teen age may have a dream of enjoying the company of Ravi Shanker, but she had never dreamed that she would fell prey in the hands of the accused and would become under

their allurement to go to Shimla. She may be treating herself safe, while in the company of Ravi Shanker, but her belief stood destroyed, when the accused apprehended her in the wee hours of the day on 21.5.1997 when she went to toilet, and both the accused committed rape upon her, simultaneously. The prosecutrix stood the test of time during the cross-examination and unfolded the circumstances in which she was raped by the accused in minute detail. The relevant portion of her statement made during cross-examination is reproduced as under:-

> "...The seats were got booked by the accused. Both the accused had asked me to accompany them to Ambala as it was comparatively cold at Ambala. I did not refuse to accompany the accused. The accused continued to commit sexual intercourse with me for ten minutes. In those days, I was menstruating. At the time of committing rape by the accused, I had received a small injury on my right foot. It was a simple scratch. No other injury was received by me. I tried to get rid of the accused, but the accused did not allow me to go. My frock was torn when the accused committed rape. My underwear was taken off by the accused. Similarly, Chandan accused also took ten minutes. I was beaten by Karan accused inside the toilet. I was given slaps."

The learned defence counsel tried to make a persuasive argument by urging that the prosecutrix while appearing before the doctor

deviated from the stand taken by her before the police and stated that the accused had put their fingers in the private parts for 2/3 minutes. Similarly, during cross-examination in the court, she stated that the accused had put their fingers and not their private parts, but the aforesaid fact as disclosed by the prosecutrix during cross-examination or before the doctor at the time of medico-legal examination, cannot be treated sufficient to discredit the testimony of the prosecutrix, which stands corroborated by the medical evidence. PW1 Dr.Benu Gupta, who medico-legally examined the prosecutrix on 21.5.1997 at 5.45 p.m. observed as under:-

> "The patient / girl was conscious. Pulse 80 p.m. History of introducing fingers in vagina 2 to 3 times each by two persons on 19th night in the train toilet for one to two minutes each. L.M.P. 16 May 1997. Age of Menarche 2 years back. Wearing the same under-wear since the act. Having 14 teeth in lower jaw and 12 teeth in upper jaw. Referred to Radiologist, Civil Hospital, Ambala City for age determination. History of being beaten on face and back when resisted. One injury mentioned below:-
>
> General examination:- Fairly built, fairly nourished young girl wearing yellow frock and red underwear blood stained, breast fairly developed, pubic, axillary hair fairly developed.
>
> On examination labia minora labia majora fairly developed, slight discharge while present around the vagina,

slight redness was present around the vagina orifice. Hymen tears present (fresh). Admits one finger easily. Examination was painful. Cervix downwards, uterus infantile, fornix clear. Vaginal swabs taken and sent for semen analysis to Chemical Examiner Madhuban. In my opinion, the act of inserting fingers/rape cannot be ruled out and opinion regarding rape would be given after Chemical Examiner's report.

Linear abrasion with clot scab on orates ... mid-part of the left leg 1 cm x 5 cm in size."

On receipt of the report from Forensic Science Laboratory, madhuban, the witness vide his report Ex.PB/1 opined that possibility of rape upon the prosecutrix could not be ruled out.

On minute study of medico-legal examination, the aforesaid discrepancy as pointed out by the learned counsel for the appellants needs no further answer. The prosecutrix also gave the history of introducing fingers on the night of 19.5.1997 by the accused. The further history regarding rape on 21.5.1997 may not have been asked by the doctor and that history was not required by the doctor, who was only concerned with the medico-legal examination, but medico-legal examination clearly reveals that it was a case of rape, wherein, the prosecutrix suffered injuries also. The ambiguity regarding inserting of fingers as pointed out by PW1 Dr.Benu Gupta and also by the prosecutrix in her cross-examination has been clarified by her in her re-examination, wherein, she stated as under:-

> "It is correct that Karan accused had put his private part in my private part inside the toilet of the compartment. Chandan accused had only put his finger."

Nevertheless, both the accused, who had accompanied the prosecutrix right from Patna to Ambala committed sexual perversity or intercourse with her. If sexual intercourse has been committed by one of them and the other merely put fingers in the vagina, even then they cannot be said not to have committed gang rape upon her, because both of them had the common design and in furtherance of that intention, they took her in the train. Sexual perversity or sexual intercourse is not material at all, because both these acts i.e. act of sexual perversity or sexual intercourse are of same transaction and linked with each other. For the offence of gang rape, actual commission of sexual intercourse by all the accused, is not required by law. If one of the accused in furtherance of the common intention of all, has committed rape, then the offence of gang rape is complete.

The prosecutrix cannot be condemned as untrue merely for non-examination of Ravi Shanker, as her evidence stands corroborated by the medico-legal evidence. The First Information Report is prompt one. The prosecutrix hails from Patna and the case was registered at Ambala. The police of Ambala is not shown to have any nexus with the prosecutrix for implicating the accused while registering the case at Ambala. No apparent enimity of the prosecutrix or her parents against the accused has been brought to surface for putting the reputation of the prosecutrix at stake

and for taking this extreme step against them by getting a case registered against them in a different State. Dr.Benu Gupta had no enimity or alliance with the prosecutrix while making observations regarding rape in the following words, "slight redness was present around the vagina orifice, hymen tears present (fresh), admits one finger easily, examination was painful, cervix downwards, uterus infantile, fornix clear, vaginal swab taken and sent for semen analysis..."

Further the prosecution version and the medical evidence find support from the report of the Chemical Examiner, Madhuban Ex.PC, whereby Assistant Director, Forensic Sciences Laboratory, Haryana, Madhuban observed as under:-

> "1. Exhibit-1 (underwear) was stained with a few large & small blood stains in the lower middle region. Human semen was detected on this exhibit.
>
> 2. Blood was detected on exhibit-2(Swab). Semen could not be detected on this exhibit.
>
> 3. Human semen was detected on exhibit-3 (underwear). Traces of blood for small for serological analysis were detected on this exhibit."

Some circumstances have been indicated by the counsel for the appellants in order to create doubt over the prosecution version that the prosecutrix may be having relationship with Ravi Shanker and the medical

evidence is the result of intercourse committed by Ravi Shanker upon the prosecutrix, but it was imposed upon the accused. Having considered this argument, no strength is detected in the same. Had it been so, then Ravi Shanker would not have accompanied the prosecutrix to Ambala and instigated her to lodge the report against the accused there. The prosecutrix had neither special enimity against the accused nor such close relations with Ravi Shanker that she will exonerate him and falsely implicate the accused. Had the intercourse been the result of act of Ravi Shanker, he would have been the last person to come forward in a distant State to instigate the prosecutrix to lodge the report.

The absconding of the accused after the occurrence adds to their guilt. It has come on record that accused Chandan Kumar was arrested on 24.5.1997 and medico legally examined him on 26.5.1997 and Sanjay Nath was arrested on 14.6.1997 and was examined on 28.6.1997. Therefore, due to the late arrest of the accused and absence of the semen on their clothes do not in any way creates a dent in the prosecution case. Identity of the accused is also not doubtful. Even refusal of Sanjay Nath to join the Identification Parade also points an adverse inference against him.

Now coming to the offence of kidnapping, following constituents are necessary to complete the offence under Section 363 IPC; (i) the forcible compulsion or by use of deceitful means, (ii) there must be going of a person from any place as such kidnapping was done from India or from the lawful guardianship. In order to establish the offence of

kidnapping, the prosecution is to establish that she was taken or removed away without her consent from the custody of any person, legally assigned her custody.

Here in this case, offence under Section 363 IPC is not made out against the accused as the prosecutrix herself came along with Ravi Shanker in the hotel, from where, she was enticed away by the accused for going to Shimla for a picnic. It is amply proved on the record that the prosecutrix being below 18 years of age was induced by the accused to leave Patna for Shimla, knowing that it is likely that she will be forced or induced to illicit intercourse by them. Consequently, they committed rape upon her. Therefore, it can safely held that the accused committed offence under Sections 366-A and Section 376(2)(g) read with Section 34 IPC only. Hence, the conviction of the appellants under Section 363 read with Section 34 IPC is set aside and the judgment of conviction stands modified accordingly.

So far as the quantum of sentence under Sections 366-A and 376(2)(g) read with Section 34 IPC is concerned, the accused being the preparators of the crime under an earnest plan allured the prosecutrix and brought her by train to Ambala and raped her during journey. If such heinous acts are dealt with leniency, then it will deliver a wrong message to the society and people will loose faith in the administration of justice. Consequently, the appellants do not deserve any leniency. To my mind, the sentence already awarded to them is on the lower side against what they

deserved.

For the foregoing reasons, except for the above modification, the appeal fails and the same is hereby dismissed. Chief Judicial Magistrate, Ambala to ensure the custody of the accused to undergo the remaining part of the sentence.

May 11, 2007 (A.N.JINDAL)
gian JUDGE

To be Referred to Reporter - **Yes/ No**